ARIZONA SUPREME COURT
Committee on Civil Rules of Procedure in Limited Jurisdiction Courts ("RCiP.LJC")
Minutes
September 28, 2011

Members present:	Members present (cont'd):	Guests:
Hon. Paul Julien, Chair	David Hameroff	Hon. Rebecca Berch
Hon. Hugh Hegyi	Stanley Hammerman	Anne Ronan
Hon. Jill Davis	Emily Johnston	Jon Hultgren
Hon. Timothy Dickerson	Nathan Jones	Richard Groves
Hon. Maria Felix	William Klain	Eric Lougin
Hon. Gerald Williams	George McKay	Floyd Bybee
Mary Blanco	David Rosenbaum	Theresa Barrett
Veronika Fabian	Anthony Young	
	(All members present)	

Staff: Mark Meltzer, Julie Graber

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1. Call to Order; stakeholder input; approval of meeting minutes. The Chair called the meeting to order at 10:05 a.m. The Chair requested a summary of stakeholder input concerning the proposed rules that had been received subsequent to the August 11 Committee meeting.

The Chair noted that he and staff had attended a meeting of the State Bar's Civil Practice and Procedure Committee (*"CPPC"*). Mr. Klain, the CPPC's chair, said that after RCiP.LJC's rule petition is filed, the CPPC would prepare formal comments. The CPPC's comments are subject to approval by the Bar's Board of Governors. A CPPC subcommittee lead by Ms. Anne Ronan has been formed to review a final version of the rules.

Judge Dickerson and Judge Davis reviewed their respective judge meetings in Cochise and Mohave Counties, both of which were attended by the Chair. Comments were generally positive on having a set of civil rules for justice court cases. Questions were asked about whether motions would be eliminated, and how simple the rules will be. It was noted that most judges have their own way of processing a civil case, and every judge wants the draft rules to embody their individual way of doing things.

Judge Felix summarized comments made during the Justice of the Peace Association meeting earlier this month, where the Chair presented the draft rules. It appeared to be the consensus at this meeting that pretrial conferences should be optional rather than mandatory. Other comments that were made included: there should be limits on the number of motions to extend time; complaints should be verified and should include supporting documents; discovery should not be permitted; and the rules should allow entry of a judgment by the court, even without a motion to do so, when an answer does not state a defense. Finally, Judge Williams noted these additional

comments: judges are lenient in enforcing rules when one of the litigants is self-represented; depositions should be abolished in justice court cases; and there were concerns that eliminating rules may eliminate rights of litigants. In general, the judges were interested in having a set of civil rules that was easier to read.

Staff reported on his presentations to the Limited Jurisdiction Court Administrators Association and the Committee on Superior Court. The LJCAA was interested in whether these draft rules would apply to small claims; they do not, with exceptions, such as the rule on default. COSC inquired on whether the rules would have provisions for appeals; they do not, appeals are covered by the Superior Court Rules of Appellate Procedure ("SCRAP").

The Chair noted that the Supreme Court was considering a global review of the rules of civil procedure for the superior court. The Chair then asked the members to review the minutes of the prior meeting.

> **Motion:** A motion was made to approve the August 11, 2011 meeting minutes. The motion was seconded and it carried unanimously. **RCiP.LJC 11-012**

2. How simple should the rules be? The Chair opened a discussion about the level of simplicity the justice court rules should strive to achieve. Judge Hegyi began the discussion. He said that the rules should be simple enough to be briefly explained to self-represented litigants, and they should be intuitive for those litigants. He acknowledged that the current version of the rules is a good simplification of the existing rules, but that alone may not provide the degree of simplification he thinks is necessary.

Judge Hegyi envisions a process where a default is efficiently entered if no answer is filed. If an answer is filed, the clerk would send the parties a notice to appear for a conference with a "conference officer." The conference officer would quickly determine if a settlement could be reached, and if so, the settlement would be memorialized and sent to the judge for entry. If there was no settlement, the parties would exchange exhibits and a list of witnesses; and the conference officer would provide deadlines for other disclosures and discovery, if discovery was appropriate. This schedule would be memorialized and sent to the judge, who would provide a trial date; and if there was any issue about whether particular discovery could be undertaken, the judge would rule on it. The entire process envisioned by Judge Hegyi could be conducted in about fifteen minutes.

Judge Hegyi feels that this conference would streamline justice court procedures, and is similar to what is done by the Maricopa County Superior Court in domestic cases. The process would be helpful for self-represented litigants because (1) the case would require only two court appearances, one for the conference and the second for trial; (2) the litigant would know after the first appearance when the trial is scheduled; and (3) the process requires that very little be done in writing, which would level the playing field for litigants with little education.

Judge Hegyi believes that this process will provide self-represented litigants with a feeling that they have participated in the legal process, and it will reduce feelings of frustration and alienation. Some of the rules that have already been drafted may be incorporated into his proposed process, but even if his proposal requires additional meetings, he thinks that this Committee should seize a once-in-a-generation opportunity for meaningful change.

Judge Williams questioned whether a conference is more efficient in resolving a case than a motion. For example, he can decide a motion for judgment on the pleadings more quickly than he can conduct a conference. Eviction hearings are accelerated by necessity, but the civil case track is not as speedy. Judge Williams added that while answers are filed in about 20 percent of collection cases, even in many of those cases the defendant answers that money is owed "but...[with some other explanation for non-payment]." Judge Hegyi suggested a rule whereby the judge could review the pleadings in those cases and enter judgment sua sponte if there's no meritorious defense. On the other hand, Judge Hegyi believes that if there is a triable issue under the pleadings, the litigants should have an opportunity to explain their positions in court, because responding to motions and particularly motions for summary judgment can be baffling for self-represented individuals.

Mr. Klain offered support for Judge Hegyi's view, but commented that he would be cautious about eliminating rights that exist under the current rules. He noted that a proposed amendment to Rule 56 would allow the judge to grant summary judgment for a non-moving party, or for a moving party on grounds not raised by that party. However, who would explain to a self-represented litigant why their case is now over without ever having a "day-in-court" if there was a similar provision in justice court?

Mr. Klain raised the possibility of having two sets of justice court rules: a short set, perhaps four pages, which would be comprehensible to self-represented litigants; and a longer set, like the current draft version, for use by attorneys. The parties would presumptively use the short set, but could "opt in" to use the long set. Mr. Klain also offered a third option: that the judge would determine which set of rules applied. Judge Williams felt that if a self-represented litigant opted for the simplified rules initially, and then later retained an attorney, the attorney might be unfairly bound by the earlier election. Judge Davis observed that a short set of rules might result in a process similar to one used in small claims lawsuits, where there are no rules and the parties are simply encouraged to speak with one another about resolving the case.

Mr. Jones' concept of simplicity included allowing discovery only upon motion, as is done in limited jurisdiction courts in Nevada. He added that judges in Coconino County justice courts conduct all proceedings because there are no conference officers or mediators, and he questioned whether remote courts would have the available resources if these conferences became mandatory. He believes that the existing draft represents consensus and compromise. He also believes that self-represented litigants are better able to understand these rules than we might suppose, but that it would enhance their understanding if they knew where to look in the rules for answers.

Mr. Rosenbaum observed that much of what Judge Hegyi proposed is included in the current draft of the justice court rules. The current draft includes rules for filing, service, answering, and the like, and even under Judge Hegyi's proposal, rules such as these would be necessary. He noted that the Committee retained discovery and motions in the draft rules because litigators have stated that those rules serve to streamline the process rather than slow it. He also questioned whether courts have sufficient resources to conduct an early, fifteen-minute conference in every disputed case. However, early judicial action that facilitates settlement might be built-in to the existing draft. If the Committee supports early judicial intervention, it should be optional because it might not work in every court. He reminded the members of the values of due process and judicial precedent, and the rules should embody these principles.

Mr. Hammerman commented that appearing in justice court can be intimidating for anyone. It begins with a long line for security, continues with another line at the clerks' counter, and is followed by a wait in the courtroom. He believes that Judge Hegyi's proposal is no less intimidating than the current process. He added that the rules are inherently fair, but they need to be administered more justly. For example, even in situations where he has filed a meritorious motion for judgment on the pleadings, it's been denied so that a defendant can have a day-in-court. Mr. Hammerman said that he's been surprised at trials by witnesses who were never disclosed. Most litigants and some lawyers don't read the rules, and clerks may not have time to answer questions. The process should be explained in a few pages that litigants will actually read and follow. The Chair agreed that additional training on civil procedure would benefit judges and their staff.

Mr. Young expressed his concerns that oversimplification of the rules could dilute due process, and could transform all justice court procedures to the small claims level. He does not support a small claims approach for all cases under $10,000. He mentioned that oversimplification could discourage litigants if it makes them feel that "the deck is stacked against them." The rules need to promote predictability and consistency.

Ms. Johnston stated that $10,000 is a significant sum for most self-represented litigants, and the rules should fairly serve these litigants as well as those with counsel. Ms. Johnston expressed concern that when self-represented litigants oppose parties who are represented, attorneys will opt for whatever set of rules is disadvantageous for self-represented individuals. She also felt that conference officers who are not law trained might give litigants the impression that they are not getting a *"real"* judge on their case.

Ms. Fabian believes that Judge Hegyi's proposal does not provide enough support for consumers. She stated that plaintiffs make mistakes when they file lawsuits, and discovery is her tool for determining those cases in which mistakes were made. She asked why a consumer who owes $10,001 should have more rights than a consumer who owes slightly less.

The Chair inquired whether volunteer lawyers for self-represented litigants might level the field. One of the members responded that this would be a good opportunity for new lawyers to get

experience, but that most of them would want cases in the superior or federal courts, and would decline to serve as volunteers in justice court cases.

Judge Dickerson expanded on the volunteer ADR program that exists under Cochise County Local Rule 12. Volunteer mediators, many of whom are retired and who have a variety of educational backgrounds, get hours of training before serving in the program. In arbitrations conducted by these volunteers, the rules of evidence are loosely applied, and either side can appeal a volunteer's arbitration decision and have a trial de novo before a justice of the peace. In those Cochise County cases in which an answer is filed and that are not disposed of by motion, eighty percent are resolved by ADR. The Cochise County judges therefore have fewer trials, and he considers the program successful. He acknowledged that other justice courts might not have the resources to establish a similar ADR program.

Judge Dickerson is concerned that if there were two sets of rules, attorneys will opt out of the simple set and self-represented litigants would still have to deal with the more complex set. He is in favor of discovery only for good cause. He added that the limited jurisdiction court reference manuals contain only "the basics" for civil cases, and that more training in civil cases would benefit judges. Staff turnover can also hinder the ability of the clerks to become knowledgeable about the rules and respond to questions from self-represented litigants.

Mr. Hameroff felt that Judge Hegyi's proposal could dispose of a certain percentage of the cases, but not all of the cases. Ms. Blanco stated that giving self-represented litigants an option on which rules applied was too complicated, and that we should have only one set for all cases. She also stated that most cases conclude by default judgment, and the Committee is trying to create a complex scenario for a minority of the cases, that is, those cases where answers are filed. She added that her court is in downtown Phoenix, yet despite the dense population, the court had difficulty in finding a suitable number of volunteer mediators.

Judge Felix added that Pima County Consolidated Justice Courts had over 1400 new civil filings during August. She re-iterated the views expressed at the JP association meeting, that the rules about pretrial proceedings should be permissive rather than mandatory.

Mr. McKay emphasized the view that proceedings in justice court are important, and that these courts should continue to function as a respected component of the court system. For defendants in justice court, the money at stake is considerable. Oversimplification minimizes the protections afforded by law. The litigants deserve these careful protections, and not a ten-minute, television-style version of court proceedings.

Judge Hegyi observed that some of the members appeared to agree with him, and others appear to support the draft rules. Judge Hegyi agreed that the draft rules simplify the existing rules, but the public criticizes the courts for taking too long and for being too confusing, and the draft rules should therefore be even simpler. He questioned whether the average self-represented litigant would understand the current version of the draft.

The Chair thanked the members for expressing their views, and especially Judge Hegyi for initiating this re-evaluation of the rules. The Chair noted that staff throughout this process has listened to the philosophy underlying the members' comments, and has attempted to incorporate the essence of their concepts within the draft rules.

3. Disclosure concerning assigned debts in collection cases. The Chair continued with an issue concerning assigned debts in collection cases, specifically, how to provide the defendant-debtor with information about the identity of the original creditor. Ms. Fabian stated that this information, along with the terms of the contract and documentation of the last payment, should be provided early in the litigation, perhaps as attachments to the complaint. She said she benefits from early disclosure to determine if statutes of limitation, choice of law, and other defenses might be available.

The Chief Justice entered the room and briefly thanked the members of the Committee for their time and effort on this project.

Mr. Klain then reiterated his prior position: that the rules should not single out a class of plaintiffs by requiring heightened disclosure. Whether information should be disclosed depends on the particular case, and if a defendant is entitled to the information, there is a process under the discovery rules for obtaining it. Judge Williams stated that the rules should not require attaching documents to complaints; in light of the number of complaints that proceed to default, such a requirement would burden the courts with unnecessarily thick case files. Mr. Hammerman reminded the members that the draft rules are procedural, not evidentiary, and that the rules should not require production of items such as original contracts that contradict federal lending laws. He said that the rules should not have different disclosure standards for plaintiffs and defendants. He mentioned that the members previously discussed this issue, and resolved it by a formal motion at the June 9 meeting, and a member read aloud a portion of the June 9 minutes. Members then made and voted on motions:

> **Motion:** A motion was made to include in the rule on the content of the complaint (currently Rule 111) a requirement that the complaint include, in actions to recover on a debt, the identity of the original owner of the debt. The motion was seconded and it carried unanimously. **RCiP.LJC 11-013**
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> **Motion:** A motion was made that the disclosure requirements, currently set out in paragraphs (c), (d), and (e) of Rule 122 concerning pretrial conferences, be removed to a new, separate rule on disclosure statements, for inclusion with the rules on discovery. The motion was seconded and it carried unanimously. **RCiP.LJC 11-014**
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> **Motion:** A motion was made and seconded that a requirement currently contained in Rule 122(c)(4), entitled "copies of documents concerning assigned debts", be removed from the new disclosure rule and that it remain in the rule on pretrial conferences, so that plaintiffs in assigned debt cases would be required to bring specified documents to the pretrial conference. Comments concerning this motion included the following:

- The documents might not be available at the time of the pretrial conference.
- What is the sanction if the documents aren't brought to the pretrial conference? Without a sanction, the requirement is not useful.
- The requirement unfairly singles out a particular class of plaintiffs.
- Creditor-plaintiffs already have a duty under the disclosure rule to disclose any exhibits they will use to prove a case, and this rule is cumulative and unnecessary.
- In cases where disclosure statements have been exchanged before the pretrial conference, this requirement is redundant.

The motion passed, 8-6-1. **RCiP.LJC 11-0015**

The discussion on this last motion revealed that issues concerning the language of this rule still remain, and Mr. Young, Mr. Hammerman, Ms. Fabian, and Judge Williams as a workgroup will discuss them and propose solutions. At this point Mr. Hammerman left the meeting, designating Mr. Hultgren as his proxy. Mr. Hultgren noted that at the pretrial conference in certain precincts, the clerk provides the parties with a form to complete, the parties return the completed form to the clerk, and the conference is over without the parties ever seeing the judge. Mr. Young stated the workgroup would consider this scenario in addressing issues under the pretrial rule.

Action: The workgroup will report at the next Committee meeting.

4. Default procedures. Defaults occur in a majority of civil cases in justice courts, and the members proceeded to review the default procedures set out in draft Rule 140. Ms. Blanco noted that in her court, attorneys may file a motion for default judgment concurrently with the application for entry of default, or they may file the motion after the application. Members indicated that their practices vary, with some filing the motion at the same time as the application, and others filing the motion thereafter. Attorneys prepare their own forms of judgment. Ms. Blanco stated that her court prepares default judgments if the plaintiff is self-represented, although one member expressed concern about this. Ms. Blanco suggested that the draft rule should include a time period, perhaps sixty days, after the default is entered in which to file a motion for default judgment.

The discussion encompassed what should occur if an answer is filed after the ten-day grace period, but prior to the entry of a default judgment. Some members held the view that on the tenth day the door is shut, and the answer should no longer be considered by the court; or that if the court receives an answer, it should set the matter for a pretrial conference to inform the defendant that the answer was untimely. Others stated that the length of the grace period is within the court's discretion; if an answer is filed any time before entry of judgment, the case should be set for a pretrial conference and proceed on the merits. While some courts apparently require a motion to set aside a default in this scenario, other courts forego this because the motion is not readily understood by self-represented parties, and because the defendant did what was requested, i.e., file an answer, even though it may not have been timely.

5. Next steps. There are a number of issues that must still be discussed. The Chair proposed another meeting on October 25 at the Judicial Education Center in Phoenix. Mr. Klain asked the members to review R-11-0010, abrogating Rule 13(f) and amending Rule 15(a)(1), as well as a proposal the State Bar is considering concerning Rule 56, which he will provide.

6. Call to the Public; Adjourn. There was no response to a call to the public. The meeting was adjourned at 3:05 p.m.

The next meeting date is tentatively set for **Tuesday, October 25, 2011.**